IN THE

# Supreme Court of The United States

October Term, 1978

## No. 78-909

CITY OF CINCINNATI, OHIO
Petitioner

v.

PUBLIC UTILITIES COMMISSION OF OHIO, CINCINNATI GAS & ELECTRIC CO.
Respondents.

## BRIEF OF RESPONDENT PUBLIC UTILITIES COMMISSION OF OHIO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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### STATEMENT OF THE CASE

The Respondent, Public Utilities Commission of Ohio ("PUCO"), will confine, as much as possible, its statement of the case to where it disagrees with the summary of the proceedings below contained in the Petition for Writ of Certiorari filed with this Court by the Petitioner City of Cincinnati ("Cincinnati"). In its statement of the case the PUCO will refer to the three cases which originated with the PUCO as follows:

1) The application of March 25, 1975, filed with the PUCO by the Cincinnati Gas and Electric Company ("CG&E") for an increase in rates for the gas service

it provides in the City of Cincinnati (Case No. 75-205-GA-AIR), will be referred to as "the 205 case".

2) CG&E's application of August 20, 1975, for an increase in rates for its gas service in 63 named municipalities located outside of the City of Cincinnati (Case No. 75-641-GA-AIR), which rates had been previously set by municipal ordinance contract, will be referred to as "the 641 case".[1]

3) CG&E's application of September 4, 1974, for an increase in rates for gas service which was not being provided (at that time) under municipal ordinance contract, including gas service to special contract or "interruptible" industrial customers, to unincorporated areas outside of the City of Cincinnati, and to incorporated areas outside of that city whose rates had not been previously established by municipal ordinance contract (Case No. 74-581-GA-AIR), will be referred to as "the 581 case".

As was correctly noted by Cincinnati in its Petition, by entry of June 9, 1976, the PUCO consolidated for hearing the 205, 641 and 581 cases because they presented "common issues of fact and law", and scheduled the consolidated hearing for July 12, 1976 (Petition, p. 5). However, Cincinnati erroneously concludes that by that entry, and by its appearance entered at the consolidated hearing, it became a party in *all three cases* (Petition, p. 5). On April 8, 1975, after all three cases had been filed with the Commission, Cincinnati filed a petition for leave to intervene *only* in the 205 case, the case fixing rates for service provided within its borders (Respondent's App., p. 21). By entry dated June 9, 1976, the same day the PUCO issued its entry consolidating the three cases for hearing, the PUCO granted Cincinnati's petition for intervention in the 205 case (Respondent's App., p. 24). Thus, of the three cases, Cincinnati applied for and the PUCO granted intervention only in the 205 case.

In its Petition, Cincinnati incorrectly interprets Section 1.04 of the PUCO's Code of Rules and Regulations (now Section 4901-1-04, O.A.C.) as having automatically conferred upon Cincinnati party status in the 581 and 641 cases at the time it entered its appearance at the consolidated hearing (Petition, p. 5; App. H, pp. 97a-98a). It is true that that rule states that a municipal corporation "may" become a party to a PUCO proceeding ". . . (d) by entering an appearance at the hearing." However, that rule has never been interpreted by the PUCO to allow intervention as a party in its proceedings merely by entering an appearance at hearing, without some showing of an "interest" in the proceeding and without the presiding hearing officer specifically ruling upon a request to intervene, neither of which occurred when Cincinnati made its appearance at the consolidated hearing. See the relevant portion of the PUCO's unreported opinion and order in

[1] Incorporated municipalities in Ohio are vested by Article XVIII, Sections 4 and 5, of the Constitution of Ohio (1851) with the authority to fix rates for the gas service provided to the customers within their boundaries (Respondent's App., p. 18). When these municipal ordinance rates expire, Ohio R.C. 4909.34 allows the gas utility to apply for an increase in rates for the gas service previously affected by the municipal ordinance, precisely as CG&E did in the 205 and 641 cases below when the municipal ordinance rates covering the service areas in those cases expired (Respondent's App., p. 18). As a result of the operation of the "home-rule" authority which municipalities enjoy in Ohio, the PUCO is often required to set rates in rate cases for less than a utility's entire service area.

*Sam Masters*, PUCO No. 73-678-C (1976) attached to this Brief (Respondent's App., pp. 41-42).

As a direct result of the above interpretation of Rule 1.04 of the PUCO's Code of Rules and Regulations, Cincinnati did not become a party to the 581 and 641 cases merely by entering its appearance on the first day of hearing. That appearance served *only* to enter Cincinnati's appearance as intervenor in the *only* case in which leave to intervene had been requested and granted, the 205 case. It is true, as Cincinnati is quick to point out in its Petition, that the PUCO moved to dismiss Cincinnati's appeal to the Supreme Court of Ohio from its opinion and order in the 581 and 641 cases citing various grounds, one of which was the same argument made here that Cincinnati was never a party to those cases (Petition, p. 7). However, although the Supreme Court of Ohio overruled that motion to dismiss, that Court did so without explaining its reasons (Petition, App. K, p. 108a). As a result, the overruling of the PUCO's motion to dismiss can hardly be cited, as Cincinnati does in its Petition, as evidence that the Supreme Court of Ohio disagreed with the PUCO's interpretation of its own rules (Petition, p. 7). Indeed, in its opinion in the case below, that Court suggested strongly its agreement with the conclusion of the PUCO that Cincinnati was a party only to the 205 case, when it noted in its summary of the facts that:

> "The parties in the other two cases moved that their actions be severed from the city's." (Petition, App. A, p. 2a)

Similarly, that Court stated the very question of law brought to this Court by Cincinnati's Petition as follows:



> "In its first proposition of law the city contends that the severance of *its case* [the 205 case] from the rate cases concerning the rest of the area serviced by the gas company [the 581 and 641 cases] denied the city due process of law . . ." (*emphasis added*) (Petition App. A, p. 3a)

Clearly, at no time in the proceedings below was Cincinnati considered a party to the 581 and 641 cases.

Because Cincinnati was not a party to the 581 and 641 cases, when the PUCO staff, CG&E and the Armco Steel Company (the parties to those cases) reached agreement on all of the issues in those cases (Petition, p. 5), and recommended that those cases be severed from the 205 case for decision (Petition, p. 6), those cases truly were "ripe" for decision for the simple reason that all parties to those cases had reached agreement on the issues presented by the applications in those cases (Petition, App. D, pp. 43a-44a).[2] Consequently, after the consolidated hearing (in which Cincinnati participated fully) had come to a close on July 22, 1976, the PUCO issued its opinion and order in the 581 and 641 cases, severing those cases for decision on the basis of the stipulation submitted at hearing by

[2] As Cincinnati points out in its Petition, among the issues upon which agreement was reached, the parties to the 581 and 641 cases jointly recommended approval of uniform rates for the service areas covered by the applications in those cases and recommended that a uniform earnings erosion adjustment of nine cents per Mcf be added to the rates fixed in each case (Petition, pp. 5-6). Contrary, however, to the repeated assertions made by Cincinnati in its Petition, the negotiations among the parties to the 581 and 641 cases which led to the stipulation in those cases did not conclude prior to Cincinnati being carefully informed of their pendency (Petition, App. A, pp. 3a-4a; App. D, pp. 43a-44a).

the parties to those cases (Petition, pp. 6-7; App. D, pp. 44a-45a). The PUCO accepted the recommendation of those parties that uniform rates be established for the service areas covered by those cases and that a uniform earnings erosion surcharge of nine cents per Mcf be added to the rates set in those cases (Petition, App. D, pp. 53a-54a). The PUCO was careful to make clear in its opinion and order, however, that:

> ". . . no inference should be drawn from the Commission's decision in these proceedings as to its position on matters not necessary for the decision, including those which may be contested in Case No. 75-205-GA-AIR." (Petition, App. D, p. 45a)

Obviously, however, Cincinnati did not find the PUCO's assurances very reassuring, because it argued before the Supreme Court of Ohio on appeal, and now in its Petition to this Court, that the severance of the 581 and 641 cases for decision and the PUCO's fixing of uniform rates and its allowance of a uniform nine cents per Mcf erosion adjustment in those cases, effectively precluded a different determination of those same issues in the 205 case (Petition, pp. 7, 9-14). Cincinnati claims that, as a result, it was deprived of a fair hearing in the 205 case (even though it participated fully in the consolidated hearing) in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution under what has come to be known as the Ashbacker doctrine, from *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327, 330 (1945) (Petition, pp. 9-10).[3]

[3] *Ashbacker Radio Corp. v. F.C.C., supra,* stands for the proposition that if two applications pending before an administrative agency are "mutually exclusive", that is, the granting of one cannot be made without effectively denying the other, then a decision by that administrative agency to hold a separate hearing on one of the applications first can render any right to a hearing on the second application "an empty thing."



However, not only is the Ashbacker doctrine inapplicable to the circumstances of the proceedings below, as the Supreme Court of Ohio concluded in its opinion in this case (Petition, App. A., pp. 3a-5a), but Cincinnati's argument supporting its Petition for Writ of Certiorari assumes incorrectly that it had a constitutionally protected right to a hearing in the 205 case which could have been denied under any circumstances. Thus, Cincinnati has not presented to this Court a sufficient federal question to enable it to invoke its jurisdiction under 28 U.S.C. 1257(3). The PUCO will elaborate on each of these points in its Argument below supporting its conclusion that Cincinnati's Petition for Writ of Certiorari should be denied.

## QUESTIONS PRESENTED

Do utility ratepayers have a sufficient property right in any fixed rate for intrastate utility services to entitle them to the protection of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution when a state utility commission considers an application for an increase in that fixed utility rate?

Assuming utility ratepayers have a constitutionally guaranteed right to a hearing when their intrastate utility rates are changed pursuant to state law by a state utility commission, can that right to a hearing be effectively denied by the severance of a prior case from the case in which their rates are to be set, and the resolution of common issues of fact and law in that prior case, where neither state law nor the opinion

issued by the state utility commission in the prior case would require the same decision on those common issues?

## ARGUMENT

Cincinnati's Petition for Writ of Certiorari can be denied on any of three grounds.

1) First of all, Cincinnati simply has failed to demonstrate in its Petition that the issue it raised in that Petition involves a federal question. As a result, it has failed to invoke the jurisdiction of this Court under 28 U.S.C. 1257(3). To do that, it must be stressed, a mere assertion of a claim with respect to some constitutional right is not enough. See *U.S. Fidelity & Guaranty Co. v. State of Oklahoma*, 250 U.S. 111 (1919).

Before Cincinnati can be heard to claim before this Court that any constitutionally protected right to a hearing in the 205 case was effectively denied when the 581 and 641 cases were severed for decision (under the theory advanced in *Ashbacker Radio Corp. v. F.C.C., supra*), it must *first* demonstrate that it had such a right to a hearing in the 205 case guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. A right cannot be denied if its does not exist.

Unfortunately for Cincinnati's claim, however, it is a rather well-settled principle of law that utility ratepayers have no constitutional right to a hearing under the United States Constitution in state administrative proceedings fixing intrastate utility rates.[4] Any right

[4] It should be noted that the Supreme Court of Ohio did not address this particular question in its opinion in this case, choosing instead to ground its decision on the applicability of the Ashbacker doctrine to the facts of this case (Petition, App. A, pp. 3a-5a).



to a hearing for utility ratepayers in such proceedings is strictly statutory. As stated in *California Pub. Util. Comm. v. United States*, 356 F. 2d 236, 241 (9 Cir. 1966), *cert. den.*, 385 U.S. 816, with respect to the right to a hearing:

> ". . . Public utility regulation, historically, has been a function of the legislature; and the prescription of public utility rates by a regulatory commission, as the authorized representative of the legislature, is recognized to be essentially a legislative act. . . As a ratepayer would have no constitutional right to participate in a legislative procedure setting rates, this right to be heard in a Commission proceeding exists at all only as a statutory and not a constitutional right."

See also *Teleco Inc. v. Southwestern Bell Tel. Co.*, 511 F. 2d. 949 (10 Cir. 1975), *cert. den.* 423 U.S. 875; and *Chickasha Cotton Oil Co. v. The Corp. Comm. of the State of Oklahoma*, 562 P. 2d. 507 (Sup. Ct. Okla., 1977), *cert. den.*, 434 U.S. 829, to the same effect.

Perhaps, however, the Court in *Sellers v. Iowa Power and Light Co.*, 372 F. Supp. 1169, 1172 (S.D. Iowa, 1974) explained it best, in a case brought by certain welfare recipients challenging the constitutionality of an Iowa statute permitting public utilities requesting rate increases to post bond and begin collecting the proposed increase without hearing:

> "Plaintiffs describe the property they claim was taken from them without procedural due process as the money required to pay the rate increases prior to the determination of their legality, . . . We believe plaintiffs' claim of property interest is too broadly stated to be within the protection of the Fourteenth Amendment. In our opinion plaintiffs must show they have a legal entitlement or a

> vested right in the rates being charged before the proposed increase, before they can claim any property rights protected by the United States Constitution. . .
> Conversely, utility customers have no vested rights in any fixed utility rates [citations omitted]."

The cases cited by Cincinnati in its Petition do not contradict the principles expressed above (Petition, p. 9). The right to a hearing involved in *Ashbacker Radio Corp. v. F.C.C., supra,* which right was effectively denied under the facts of that case by the prior granting of one of two "mutually exclusive" applications for broadcast authority, was a right to a hearing established by *federal statute,* not the United States Constitution. The remainder of the cases cited by Cincinnati at page 9 if its Petition simply do not stand for the proposition that utility ratepayers have a sufficient property right in any fixed rate for intrastate utility services to entitle them to the protection of the Due Process Clause of the Fourteenth Amendment in state utility rate proceedings. Finally, in *Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 301 U.S. 292 (1937), from which Cincinnati quotes at page 15 of its Petition, this Court invoked only the constitutional guarantees afforded to a utility, not to its ratepayers, in state ratemaking proceedings. That case concerned an appeal *by the company* from an order in which the PUCO took judicial notice of price trends and property valuations without revealing the source of the information to the company. In discussing the constitutional right to a hearing in the language quoted from that opinion by Cincinnati, this Court was referring only to the constitutional protection to which a utility is entitled from confiscatory rates. See also *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1943).



Because Cincinnati had no constitutional right to a hearing in the 205 case, the only right to a hearing which Cincinnati can claim was effectively denied in the 205 case under the Ashbacker doctrine (by the severing for decision of the 581 and 641 cases) was a statutory right to a hearing provided under *Ohio law.* Indeed, it is apparently Cincinnati's theory that it was just such a statutory right to a hearing, i.e., the hearing for which Ohio R.C. 4909.19 provides, which was denied in this case (Petition pp. 8-9). However, whether or not a right to a hearing established by Ohio law was or was not denied under the facts of the present case is *not* a federal question, and is certainly not a question which Cincinnati raised in its appeal below to the Supreme Court of Ohio. As a result, Cincinnati simply has not stated in its Petition sufficient grounds to invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1257 (3).

2) In any event, even if it is assumed that Cincinnati had a constitutional right to a hearing in the 205 case, Cincinnati has not demonstrated in its Petition that that right to a hearing was effectively denied under the Ashbacker doctrine when the 581 and 641 cases were severed for decision. Cincinnati claims that its right to a hearing in the 205 case became an "empty thing" once the Commission adopted uniform rates in the 581 and 641 cases and once it allowed in each case an adjustment to CG&E's rates of nine cents per Mcf to account for lost gas sales. Cincinnati argues that the determination of those issues in those earlier cases on the basis of the stipulation submitted by all the parties to those cases "effectively" bound the Commission to make the same determination in the 205 case (Petition, pp. 10-13). Unfortunately, Cincinnati's assertion

is belied by even a cursory reading of the PUCO's orders in the 581 and 641 cases and in the 205 case.

In the 581 and 641 cases the PUCO adhered strictly to the procedure outlined by the Supreme Court of Ohio in *City of Cleveland et al. v. Pub. Util. Comm.*, 164 Ohio St. 442, 132 N.E. 2d. 216 (1956), for the establishment of reasonable utility rates under the then applicable Ohio law. The PUCO first determined the value of CG&E's property devoted to providing natural gas service to the customers affected by each application, assessed the allocated portion of CG&E's total company test-year expenses attributable to providing service to the service areas in each case, calculated the rate of return on rate base which would be earned by CG&E in each case from the stipulated uniform rates, and determined that those rates of return, although not equal, were reasonable (Petition, App. D, pp. 45a-52a). It was this analysis that allowed the Commission to find that the stipulated uniform rates would be reasonable if adopted in the 581 and 641 cases (Petition, App. D, p. 52a).

It must be stressed that because each of the applications in those two cases covered only a portion of CG&E's total service area it was necessary to allocate CG&E's total plant in service and system-wide test year revenue and expense accounts to the areas covered by each application. In other words, certain system-wide accounts had to be allocated, through proper allocation procedures, in order to eliminate from consideration CG&E's operations not covered by the application in each case. It must also be stressed that because each of the applications in those two cases covered only a portion of CG&E's total service area the Commission did *not*, in its opinion and order in those cases, determine what system-wide costs of service the company should be allowed to recover from its rates, nor did the Commission determine an overall rate of return the company should be allowed to earn from its entire operations, contrary to what Cincinnati suggests in its Petition (Petition, pp. 10, 12). System-wide totals in those two cases were relevant only as a necessary starting point for the allocation of costs to the service areas covered by the two cases. Finally, it must be stressed that in its opinion and order in the 581 and 641 cases the Commission did *not* adopt uniform rates for all of CG&E's service territory, but for only the service areas covered by those two cases (Petition, App. D, p. 53a), contrary to the suggestion made by Cincinnati in its Petition that in the 581 and 641 cases the Commission committed itself to system-wide uniform rates (Petition, pp. 10-11). Thus, under the procedure outlined above, as dictated by the then applicable Ohio law, the rate base, test-year expense and rate of return determinations in each of the 581 and 641 cases, and the uniform rates which those determinations justified in those cases, had to do only with CG&E's operations in the service areas covered in those cases.[5]



The precise rate-fixing method outlined above was followed by the PUCO in the 205 case. In its opinion and order in that case the PUCO established the value of CG&E's property devoted to providing natural gas service within Cincinnati's borders, determined the al-

[5] As was explained above the PUCO is often required to set rates for less than a utility's entire service area, primarily because of the right of municipalities in Ohio to fix the rates for utility service provided within their borders. As a result the PUCO must often resort to the ratemaking procedure outlined above.

located test-year expenses attributable to providing service to those customers, calculated the rate of return on the rate base which CG&E would earn should the uniform rates approved in the 581 and 641 cases be extended to the customers affected by the 205 case, and determined that that rate of return was reasonable (Petition, App. E, pp. 70a-77a). As a result, the Commission was able to conclude that it was reasonable to extend the rates fixed in the 581 and 641 cases to the 205 case.

Understanding the above, it becomes clear that had the record in the 205 case indicated that it would not have been reasonable to extend the uniform rates to that case (in other words, had the PUCO found that those uniform rates would have resulted in an excessive rate of return in that case), the Commission could have and *would have* refused to so extend those rates. It certainly was not prohibited under Ohio law from doing so, as the Supreme Court of Ohio explained in its opinion below (Petition, App. A, p. 5a). This is true because, as was explained above, the order in the 581 and 641 cases affected a completely different set of customers than those affected by the 205 case, and was, as a result, predicated under Ohio law on separate rate bases and separate jurisdictional allocations of test year revenues and expenses. Thus, by no stretch of the imagination did the adoption of uniform rates in the 581 and 641 cases render any right to a hearing Cincinnati may have had in the 205 cases an "empty thing" within the meaning of the Ashbacker doctrine.

For similar reasons, the decision of the Commission in the 581 and 641 cases to adopt the nine cents per Mcf earnings erosion adjustment did not preclude a different determination on that issue in the 205 case.



In the 581 and 641 cases the Commission did not authorize CG&E to adjust by nine cents per Mcf the rates applicable to all of its customers. It authorized CG&E to adjust only the rates covered by the applications in those two cases by nine cents per Mcf, as stipulated by the parties to those cases, to allow CG&E to recover from its customers in those cases an allocated share of the loss in revenues resulting from the decline in sales to interruptible customers (Petition, App. D, p. 54a). That decision certainly did not preclude Cincinnati from presenting evidence in the 205 case which might show that it would be inappropriate to attribute to CG&E's customers in the City of Cincinnati any share of that loss in revenues, nor would it have prevented the Commission from accepting Cincinnati's arguments in that regard in the 205 case, as justification for a refusal to allow the nine cents per Mcf curtailment adjustment in that case, had they been persuasive. For the reasons why those arguments were not persuasive see the portion of the Commission's order in the 205 case at Petition, App. E, pp. 77a-79a.

3) Hopefully, it is clear from the above discussion that this Court can deny Cincinnati's Petition for Writ of Certiorari for two reasons. First of all, because neither Cincinnati, nor the ratepayers it represented, had a constitutional right to a hearing in the 205 case, Cincinnati has failed to present to this Court a federal question for its determination and has, as a result, failed to invoke its jurisdiction under 28 U.S.C. 1257 (3). Secondly, even if Cincinnati had such a constitutional right to a hearing, it in fact was given a hearing in the 205 case which did not become an "empty thing" within the meaning of the Ashbacker doctrine once the Commission severed the 581 and 641 cases from that

case and once the Commission reached its determination on the issues of uniform rates and the curtailment adjustment in those prior two cases. However, there is a third reason why this Court should be reluctant to grant Cincinnati's Petition. Incorporated municipalities in Ohio, such as Cincinnati, enjoy a rather unique status as consumers of utility services and as representatives of those consumers. As was indicated above, incorporated municipalities are vested by Article XVIII, Sections 4 and 5, of the Constitution of Ohio (1851) with the authority to fix rates for the gas services provided within their boundaries (Respondent's App., p. 18). These rights are further codified in Ohio R.C. 4909.34, which also grants to utilities in Ohio the right to appeal to the PUCO any rates established by municipal ordinance that they believe unreasonable (Respondent's App., p. 18).

As a result of the "home-rule" authority enjoyed by municipalities in Ohio, even if this Court can determine that Cincinnati had a constitutional right to a hearing in the 205 case and even if this Court can determine that that right was effectively denied under the Ashbacker doctrine, Cincinnati has, in effect, asked this Court to render an advisory opinion on the issues raised in its Petition. Of what practical necessity is a ruling by this Court that Cincinnati was denied a hearing in the 205 case, if Cincinnati presently has complete authority under Ohio law to pass a municipal ordinance fixing whatever rates for gas service provided within its borders it finds reasonable. Even if CG&E were to appeal those ordinance rates to the PUCO under Ohio R.C. 4909.34, Cincinnati would participate in the hearing for which that section provides (Respondent's App., p. 18). This Court has already



cautioned Cincinnati, in another context, that it will not decide important constitutional questions unnecessarily or hypothetically. *City of Cincinnati v. Vester*, 281 U.S. 439, 448-449 (1930).

## CONCLUSION

For all of the reasons indicated above Cincinnati's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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## APPENDIX

### §4, Article XVIII, Constitution of Ohio (1851)

Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

### §5, Article XVIII, Constitution of Ohio (1851)

Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of section 8 of this article as to the submission of the question of choosing a charter commission.

### §4909.34, Ohio Revised Code

Any municipal corporation in which any public utility is established may, by ordinance, at any time within one year before the expiration of any contract entered



into under sections 715.34, 743.26, and 743.28 of the Revised Code between the municipal corporation and such public utility with respect to the rate, price, charge, toll, or rental to be made, charged, demanded, collected, or exacted, for any commodity, utility, or service by such public utility, or at any other time authorized by law, proceed to fix the price, rate, charge, toll, or rental that such public utility may charge, demand, exact, or collect for such commodity, utility, or service for an ensuing period as provided in such sections, provided that:

(A) Upon complaint in writing by any such public utility which has not filed, prior to the passage of such ordinance, a written application with the public utilities commission pursuant to section 4909.18 or 4909.35 of the Revised Code covering the municipal corporation, the public utilities commission shall give thirty days' notice of the filing and pendency of such complaint, and of the time and place of the hearing of it, to the public utility and the mayor of such municipal corporation, which notice shall plainly state the matters complained of.

(B) If at the time of passage of the ordinance provided for in this section or in section 715.34, 743.26, or 743.28 of the Revised Code any such public utility has on file a written application with the public utilities commission pursuant to section 4909.18 or 4909.35 of the Revised Code covering such municipal corporation, the passage of such ordinance shall not operate to divest the public utilities commission of jurisdiction over the application of such public utility or any part thereof, unless such public utility files a written acceptance of such ordinance as provided in section 743.28 of the Revised Code, whereupon the commission shall dismiss the application insofar as it covers such municipality. If such public utility does not accept such

ordinance, it shall so notify the municipality and the public utilities commission within thirty days after the passage of such ordinance, and such notification shall be deemed to be the consent of such public utility to continue to furnish its product or service and devote its property engaged in so furnishing its product or service to such public use during the term so fixed by prior contract with such municipality or by Chapters 4901., 4903., 4905., 4909., 4921., 4923., and 4925. of the Revised Code. Upon receipt of notification by such public utility that it does not accept such ordinance, the public utilities commission shall proceed to rule upon the application which such public utility has filed pursuant to section 4909.18 or 4909.35 of the Revised Code and, as a part of such proceedings, shall fix and determine the just and reasonable rate, fare, charge, toll, rental or service to be rendered, charged, demanded, exacted, or collected for the product or service of such public utility within such municipality.



**Before the**

**PUBLIC UTILITIES COMMISSION OF OHIO**

**No. 75-205-GA-AIR**

**IN THE MATTER OF THE APPLICATION OF THE CINCINNATI GAS & ELECTRIC COMPANY FOR AN INCREASE IN ITS GAS RATES IN THE CITY OF CINCINNATI.**

## PETITION FOR LEAVE TO INTERVENE OF CITY OF CINCINNATI

Now comes the City of Cincinnati (Cincinnati) and petitions the Public Utilities Commission of Ohio for leave to intervene in the above captioned case pursuant to Section 1.04 of the Code of Rules and Regulations of the Public Utilities Commission of Ohio.

Petitioner states the following:

1. Petitioner is a municipal corporation under the constitution and laws of the State of Ohio.

2. Petitioner's interest in this case consists of opposition to the increase in gas rates proposed for the City of Cincinnati by the Cincinnati Gas and Electric Company, which increases may be unjust, discriminatory, unreasonable and without valid cost foundation.

3. Petitioner, on behalf of itself, as a customer, and its gas rate paying public in Cincinnati, has a direct, real and substantial interest in this case, which is not otherwise adequately represented, and Petitioner should be permitted to intervene and protect such interest as to issues of fact and law that may be raised in the proceeding.

4. The names and addresses of attorneys to whom copies of filings, orders, etc. are to be mailed and who are authorized to make appearances on behalf of the City of Cincinnati are:

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REUBEN GOLDBERG, ESQ.
Suite 550
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 659-2333

WHEREFORE, Petitioner respectfully requests that the Commission grant it permission to intervene and be made a party herein, to have notice of hearing, to appear by counsel, to participate in cross-examination, and to present for consideration of the Commission through exhibits and witnesses, such evidence as may be relevant to the issues and matters involved in this proceeding.

/s/ THOMAS A. LUEBBERS
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## CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition upon all known parties or their counsel of record in this proceeding in accordance with Section 1.07 of Commission Rules and Regulations, this 8th day of April, 1975.

/s/ THOMAS A. LUEBBERS
*City Solicitor*

Dated: April 8, 1975.

**Before**

**THE PUBLIC UTILITIES COMMISSION**

**OF OHIO**

**Case No. 75-205-GA-AIR**

**IN THE MATTER OF THE APPLICATION OF THE CINCINNATI GAS AND ELECTRIC COMPANY FOR AN INCREASE IN ITS GAS RATES IN THE CITY OF CINCINNATI.**

**ENTRY**

The Commission, coming now to consider the petitions for leave to intervene filed in the above-entitled matter by the City of Cincinnati on April 8, 1975, and by Proctor and Gamble Company filed on August 18, 1975, finds that:

1) Pursuant to Section 1.04 of the Commission's Code of Rules and Regulations, a petition for leave to intervene in a proceeding shall set forth the petitioner's interest in the proceeding.

2) The above petitions set forth the petitioners' interests in this proceeding.

3) The above petitioners' stated interests do appear to be valid interests in this proceeding.

4) The above petitions for leave to intervene should be granted.

5) Leave granted on a petition to intervene entitles the intervenor to appear as a party to the proceeding, file an answer or other pleading, have notice of hearing, produce and cross-examine witnesses, and be heard in person or by counsel.



It is, therefore,

ORDERED, That the above petitions for leave to intervene be, and hereby are, granted. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record and such other persons as the Commission shall deem interested.

THE PUBLIC UTILITIES COMMISSION
OF OHIO

/s/ SALLY W. BLOOMFIELD
/s/ DAVID SWEET

*Commissioners*

Entered in the Journal June 9, 1976. A True Copy.

/s/ RANDALL G. APPLEGATE

*Secretary*

**Before**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

**Case No. 73-678-C**

**IN THE MATTER OF THE APPLICATION OF SAM MASTERS, DBA MASTERS TRANSFER SERVICE, WOODSFIELD, OHIO, TRANSFEROR, AND CLYDE G. CLIFT, GRAYSVILLE, OHIO, TRANSFEREE, FOR CONSENT TO TRANSFER CERTIFICATES 3186-I AND 5376-I.**

## OPINION AND ORDER

The Commission coming now to consider the above-entitled matter, the application filed September 10, 1973; the application filed April 10, 1974; the record made upon public hearings held October 16, 1973, November 1, 1973, December 27, 1973, and April 11, 1974; the report and recommendation of the attorney examiner filed on August 7, 1974; the exceptions to the report and recommendations of the attorney examiner filed on behalf of protestants A. L. Dressler and John D. Tonkovich received on August 19, 1974; the reply to exceptions filed on behalf of Sam Masters, dba Masters Transfer Service and Robert Neff and Sons, Inc., (transferee by assignment); and being otherwise fully advised in the premises, hereby issues its Opinion and Order in conformity with the provisions of Section 4903.09 Revised Code.

OPINION:

On September 10, 1973, Sam Masters, dba Masters Transfer Service, applicant-transferor, and Clyde Clift, an individual, applicant-transferee filed a joint application with this Commission to transfer Certificates of Public Convenience and Necessity Nos. 5376-I and 3186-I. The authority and service description pursuant to Certificate No. 5376-I reads:



> "Property from and to Barnesville, Ohio, and the territory within a five (5) mile radius therefrom.
>
> RESTRICTED as to each shipper now or hereafter listed under Contract Carrier Permit No. 3896, against furnishing the same kind and character of service under Certificate No. 5376-I as is authorized to be furnished such shipper pursuant to the terms of its contract on file with, and approved by, the Commission."

The authority and service description pursuant to Certificate No. 3186-I reads:

> "Property from all points in Monroe County to all points in the State of Ohio and reverse.
>
> RESTRICTED as to each shipper now or hereafter listed under Contract Carrier Permit No. 3896, against furnishing the same kind and character of service under Certificate No. 3186-I as is authorized to be furnished such shipper pursuant to the terms of its contract on file with, and approved by, the Commission."

The Commission, in an effort to place its discussion of the issues raised in proper perspective, deems it necessary to enter upon a brief chronology hereof.

> *Public hearing on September 10, 1973*: An appearance was tendered on behalf of the original transferee, Clyde G. Clift. Counsel informed the examiner that the transferor, Sam Masters was gravely ill and confined in a hospital. The record reveals that a power of attorney (App. Exhibit 1) had been executed on October 12, 1973, designating Mr. James R. Stiverson, Attorney at Law, as Master's attorney in fact for purposes of giving testimony and the performance of all acts necessary for transfer of Certificate Nos. 5376-I and 3186-I. Appearances in opposition were tendered

on behalf of three concerned citizen residents of Monroe County (sitis of certificates) attacking the fitness of Clyde G. Clift to hold authority. The record made on that date consisted of the transferee Clift's testimony and cross examination.

*Continued public hearing November 1, 1973*: Appearance made on behalf of Sam Masters (transferor) by Mr. James R. Stiverson, under the aforementioned power of attorney. The examiner marked the document (App. Exhibit 1) and, upon receiving the same into evidence, testimony was taken with respect to operations conducted under the authorities, the transaction under consideration, and the reasons for Master's desire to transfer. No appearances were tendered in opposition as the original three intervening citizens were only concerned with the fitness of Clift.

*Continued public hearing December 27, 1973*: Appearnces were tendered on behalf of Sam Masters, transferor, Clyde Clift, original transferee, and Robert Neff and Sons, Inc., as the new transferee by assignment of interest from Clyde G. Clift. The examiner was informed that on November 19, 1973, Clift and Robert Neff entered into an Assignment of Interest (App. Exhibit 15) wherein the parties (Clift and Neff) mutually agreed that Neff should be substituted as a principal (transferee) in the agreement between Masters and Clift. Continuing appearances in opposition tendered on behalf of three Monroe County Citizens. The examiner was informed that in the interim, a third party, one A. L. Dressler, had filed in the Muskingum County Court of Common Pleas for a temporary and permanent restraining order seeking to prevent Masters, Clift and/or Neff from transferring the authorities. The file reveals a document entitled Temporary Restraining Order, dated December 26, 1973, Case No. 73-867 which granted the T.R.O. to Dressler. In essence,



Dressler alleged a contract for purchase of the certificates conditioned upon the failure of Masters to transfer to Clift for any reason. The parties, being subject to the provisions of the T.R.O. issued in Muskingum County, sought and were granted a continuance by the examiner, recognizing that, at least until January 3, 1974, when the restraining order expired or was dissolved by the Court, the parties were bound by its provisions.

*Continued public hearing April 11, 1974*: First formal appearance tendered on behalf of A. L. Dressler as a protestant, claiming a written contract for purchase of the authorities from Masters which he contended cut off any right of assignment between Clift and Neff. Also, one John D. Tonkovich tendered an appearance in opposition alleging an oral agreement with Masters for purchase and sale of the authorities. The examiner was informed that on March 22, 1974, the Court of Common Pleas in Muskingum County issued a Judgement Entry (in file) in Case No. 73-867, finding that the plaintiff (Dressler) was not entitled to a preliminary or permanent injunction nor to any other or further relief prayed for and dismissed the case. The protestants Dressler and Tonkovich and intervening citizens argued that the Commission should continue the case pending a filing in the courts to resolve the conflicting contractural claims. The hearing examiner formally accepted the assignment of interest between Clift and Neff and substituted proper application, exhibits and publication in the Commission's official file reflecting the substitution of transferees. The examiner, after the substantial argument, denied protestants' and intervenors' motion to continue and found that neither Dressler nor Tonovich had demonstrated sufficient factual or legal interest in the outcome of the transaction before the Commission to permit them to continue to participate in opposition as

protestants and/or intervenors. The examiner further found, on the basis of the accepted assignment of interest completing the substitution of transferees, that the three intervening Monroe County residents opposing Clift's status no longer had standing to pursue their opposition. The examiner, subsequent to the aforesaid dismissals, proceeded to hear evidence of the substitute transferees's fitness to receive authority and thereafter submitted the case upon the record.

Having reviewed the actual sequence of events leading to the attorney examiner's August 7, 1974 recommendation that the Commission approve the proposed transfer from Sam Masters, dba Masters Transfer Service to Robert Neff and Sons, Inc., the Commission will now review the facts and law upon which such action was recommended.

Pursuant to Section 4921.13 Revised Code, an application may be made for consent to transfer a certificate of public convenience and necessity. In order to effectuate such a transfer, the applicants must cause publication of the application to be made in a newspaper of general circulation published at the county seat of the county in which the principal place of business of the applicant is located. Said publication must appear once a week for three consecutive weeks prior to the hearing. Furthermore, the application must comply with the form as required by the Commission's Rules and Regulations Section 3.08 as read on conjunction with Section 3.03.

The applicants Sam Masters dba Masters Transfer Service and Robert Neff and Sons, Inc., have caused publication to appear once a week for three consecutive weeks in *The Monroe County Beacon* and *The Times Recorder*, being newspapers of general circulation in



Monroe County and Muskingum County, wherein are located the principal places of business of the transferor and the new transferee respectively. In that this application and publication have been made in accordance with Section 4921.13 Revised Code and Sections 3.08 and 3.03 of the Commission's Rules and Regulations, the Commission has jurisdiction to hear and consider the issues contained herein.

The standards by which the Commission is guided in an application to transfer motor carrier authority, as set out in the *Frank Cartage Co.*, Case No. 34,452, are as follows:

(1) The reason for the proposed transfer and why the action would be in the public interest.

(2) That the authority sought to be transferred is in good standing with the Commission and that the transferor's operations and authority have been lawful.

(3) That there is no duplicative authority presently held by either the transferor or the transferee.

(4) That the price to be paid for the authority is reasonable and there will be no adverse financial effect on the claim of any creditors of the transferor.

(5) That there is a continuing use and need for the services performed under the authority and that the proposed transferee will provide the same or better service than now provided.

(6) That the applicant is a proper party to receive the authority and is knowledgeable of the Rules and Regulations of the Commission

and the laws of Ohio and possesses the requisite ability and experience and equipment to perform the service in question.

(7) That there are no outstanding taxes due from the transferor.

The record made at the November 1, 1973, hearing wherein testimony was taken on behalf of the transferor under power of attorney reveals the following facts:

(1) Mr. James R. Stiverson identified the power of attorney executed by Sam Masters on November 19, 1973 from which his authority to appear and testify is derived.

(2) The record reveals that Masters has conducted operations as a sole proprietor under both certificates for at least eighteen (18) years.

(3) The record of testimony reveals that both Mr. and Mrs. Masters are quite elderly and, especially Mr. Masters, was stated to be in poor health being confined in the hospital at the time of the hearing.

(4) Mr. Stiverson testified that he has represented Masters for eighteen (18) years and has, through such relationship, become very familiar with the type of operation conducted thereby.

(5) The signature on the contract was verified and it was stated that the $8,050.00 purchase price agreed upon for the certificates and one piece of equipment was considered fair and reasonable in relation to the volume of service provided and the kind of operations conducted.



(6) The witness, upon review of certain traffic and revenue information submitted, testified that a modest profit was generated during 1973 conducting business on a daily basis with two trucks.

(7) It was stated that the transferor was in sound financial condition with no appreciable debts.

(8) All taxes have been paid and the authorities are in good standing.

(9) In summary it was indicated that there is a continuing volume of business necessitating transportation service which, due to age and poor health, the transferor is no longer able to accommodate in accord with the statutory obligations of a common carrier.

The president of the applicant transferee (by assignment) appeared and submitted testimony and exhibits concerning his company's participation in the subject transaction. The record of testimony, exhibits and the Commission's file reveal the following pertinent considerations.

(1) The record reveals that the applicant transferee, Robert Neff and Sons, Inc., maintains its principal place of business in Zanesville, Muskingum County, Ohio, holds Certificate No. 2396 (Belmont County), and either has, or is acquiring, interests in several other regulated transportation operations.

(2) Robert Neff and Sons, Inc., has no objection to a duplicate service restriction being placed on its certificates if the instant application is granted.

(3) The record and exhibits reveal that the applicant transferee is in sound financial condition and operates sufficient pieces of equipment of various designs and uses to render service under the authorities it seeks to acquire.

(4) The record reveals that the transferee has conducted a motor transportation business since 1930 with no outstanding citations against its operation or taxes due the State of Ohio.

(5) The record reveals that upon being approached by the original transferee Clift, and appraised of the situation, Robert Neff made inquiries into the kind and character of need for service under the two certificates and, determining that such need existed, entered into the assignment of interest agreement with Clift.

(6) The record reveals that Neff has complied with the conditions specified in the contract between Clift and Masters with Clift having no further interest in the transaction and Neff ready, willing and able to consummate the contract and render service under the authorities.

(7) The transferee has conducted an investigation with respect to the needs of the shipping public in Monroe County and estimates revenues to be generated during the first full year of operations under the certificates approximating 60 to 70 thousand dollars, doubling in another year.

(8) Monroe County is forty miles from the applicant transferee's facilities in Muskingum



County and, if the instant application is granted, applicant contemplates establishment of a permanent facility in said county.

(9) The applicant, if it receives the authorities in question, proposes to conduct operations thereunder and has no outstanding agreements with Clyde G. Clift, the original transferee, or any other party.

(10) Robert Neff testified that the agreed upon purchase price of $8,000 is reasonable and has already been placed in escrow according to the terms of the contract.

The reporting examiner issued his report and recommendation on August 7, 1974. The examiner found that the transaction under consideration, being the transfer of Certificate Nos. 3186-I and 5376-I from Sam Masters dba Masters Transfer Service, to Robert Neff and Sons, Inc., was not adverse to the public interest nor the policy of regulation of transportation. The examiner found all procedural requirements satisfied, and that the guidelines for consideration of such cases set forth in *Frank Cartage Co.*, (supra) were followed. The examiner recommended that the application under consideration be granted.

The Commission, before proceeding with a discussion of the exceptions and reply, takes note of certain intervening officially recorded occurrences between the close of proceedings and the preparation of this order. The Commission has been informed that Mr. Masters, who was confined in a hospital upon public hearings herein, has died. The Commission's file reflects receipt of the following documents:

(1) Affidavit of deceased's wife, Virginia Masters, attesting to her status as sole beneficiary

of Sam Masters, (copy of Last Will & Testament in file) and her consent to consummate the transfer of Certificate Nos. 3186-I and 5376-I from the estate of Sam Masters, to Robert Neff and Sons, Inc.

(2) A copy of a Journal Entry in Case No. 4912, *In the Matter of the Estate of Sam Masters, Deceased,* ordering Virginia Masters, executrix of the estate of Sam Masters, deceased, to complete the terms of the contract of transfer of Certificate Nos. 3186-I and 5376-I.

(3) A certificate signed by Deputy Clerk of Court of Common Pleas, Monroe County, attesting to the authenticity of the aforesaid copy of a Journal Entry.

(4) Robert Neff and Sons, Inc., was granted temporary authority to conduct operations under the subject certificates on May 14, 1974.

The Commission further notes with interest that the exceptions filed herein on August 19, 1974 by Tonkovich and Dressler, do not raise issues which are common to legal and factual analysis in a proceeding, the import of which is a transfer of authority. Rather, the exceptions raise four questions concerning the examiner's rulings upon public hearing regarding standing and evidence.

The issues raised are:

(1) Was there error in accepting testimony from James Stiverson, representing the ailing transferor, under a power of attorney rather than requiring at least a deposition? (Rules



3.02C, 3.08 and 1.12) pertinent parts of said rules specified by protestants are.
(3.02c)

"Every applicant shall appear in person, or by corporate officer, upon the date set for hearing."

". . . . Failure of applicants to appear at the hearing is cause for dismissal."
(3.08)

"When a personal representative, surviving partner, receivor, trustee, or other fiduciary continues the operation of a certificate under the provisions of Section 4921.13 or 4923.09 Revised Code, notice in writing must be given to the Commission setting forth such change in the operation of the certificate and stating the reason therefore."
(1.12)

"The testimony of a witness may be taken by deposition, at the instance of a party, in any proceeding or investigation before the Public Utilities Commission."

(2) Was there error in the examiner's finding that protestants Tonkovich and Dressler (both claiming rights under oral or written contracts with the transferor) had no discernible interest over which the Commission had jurisdiction and that said appearances were untimely and prejudicial?. (fourth day of public hearing) (exceptions raise Rule 1.04 and precedent. *New York Central Railroad Company v. PUCO*, 157 Ohio State 257)?
(1.04)

"Any person, firm, company, corporation or association, mercantile, agricultural or man-

ufacturing society, body politic or municipal corporation, railroad or public utility, may become a party: (d) by entering an appearance at the hearing."

The Supreme Court, in *New York Central Railroad Company vs. PUCO*, 157 Ohio State 257, held that due process requires that any parties affected by any temporary action of the Commission be given a reasonable opportunity to be heard. The Court went on to further hold that no final order could be issued by the Commission without according to the parties affected by such order a reasonable opportunity to be heard. The refusal of the Commission to allow and appearance of the protestants and to allow the protestants to testify and submit evidence in their behalf is a violation of the constitutional right to due process.

(3) Was there error in the examiner's not finding that the question of legal capacity of the transferor to contract with the transferee-assignee was subject to court determination, with such determination being a condition precedent to Commission's continuing jurisdiction herein?

Protestants argue that, *having alleged oral and/or written contracts* with the transferor conditioned upon the failure of transfer to Clift for any reason, the legal capacity of Masters to contract with the substituted transferee was a legal issue subject to court determination. The protestants argue that an order approving the transfer from Masters to Neff (transferee by assignment) would amount to an approval of potential breach of contract on the part of the transferor and therefore, not in the public interest (*Frank Cartage*, Case No. 34,452).



(4) Was there error in finding that the applicants transferor and transferee (assignee) sustained their burden of proof requisite for approval of a transfer (*Frank Cartage*; Case No. 34,452)?

Protestants argue, in accord with their first contention of error, that the testimony submitted on behalf of the transferor by power of attorney was inadmissable under Commission rules and the applicants have failed to sustain their burden of proof thereby.

The first error alleged is the examiner erred in accepting testimony from James Stiverson, who was representing the transferor, under a power of attorney rather than requiring at least a deposition. In support of this proposition, protestant cites Case No. 35,266, *Huntington-Cincinnati Trucking Lines* and Sections 3.02 (C), 3.08, and 1.12 of the Commission's Rules and Regulations.

Section 3.08 is not relevant to this proceeding at all in that it pertains to a continuation of the business by a personal representative, surviving partner, receiver, trustee, or other fiduciary. This proceeding is for the transfer of a certificate not the continuation of the business.

Section 3.02 (C) and *Huntington-Cincinnati Trucking Lines* must be considered together. Section 3.02 (C) states "Any applicant shall appear in person or by corporate officer, upon the date set for hearing. . . . failure of applicants to appear at the hearing is cause for dismissal." Counsel for the protestants cited *Huntington-Cincinnati Trucking Lines* for support of the proposition the applicant must appear in person at the hearing. It would appear that counsel did not read

the entire case. This particular case stated the testimony of the particular substitute witness was "dubious at best" but did not dismiss the application. Furthermore, this case also cited a case in which a substitute witness testified and such testimony was accepted. *Dorothy C. Madrid,* dba *M and M Trucking Co., and Dot Express,* Case No. 4953, Order dated October 4, 1968. The Commission stated Section 3.02 (C) of the Commission's Rules and Regulations does not categorially state that failure of each applicant to appear requires dismissal of the application. The Commission should weigh the factors involved in the case and make a decision on those factors alone. In the case at bar, neither Mr. or Mrs. Masters were physically able to testify at the hearing and the file contains an affidavit from Mrs. Masters prepared after the death of her husband indicating her desire and consent to complete the pending transfer. The file also contains a journal entry from the Probate Court of Monroe County authorizing Mrs. Masters as executrix of her husband's estate to complete the transfer. Final documents submitted and placed in the Commission's file consist of letters testamentary from the Probate Court and a power of attorney granted by Mr. Masters to Mr. Stiverson permitting him to take all actions necessary to transfer this certificate. In view of the circumstances of this case as summarized above, it is this Commission's opinion the examiner's acceptance of the testimony of James R. Stiverson under a power of attorney was a proper and supportable exercise of discretion which should be upheld.

Section 1.12 states "[T]he testimony of a witness may be taken by deposition, at the instance of a party, in any proceeding or investigation before the Public



Utilities Commission." Protestants appear to be of the opinion that this means the deposition of Mr. Masters should have been taken. However, the protestants, in their exceptions to the attorney examiner's report, stated the Commission "should not impose such a strict interpretation of its rules that would create an undue hardship on the applicants". By forcing the deposition to be taken that is exactly what would be happening. A deposition is not the only viable alternative. Here a deposition would create a hardship on the parties as both Mr. Masters and his wife were ill at the time of the hearing with Mr. Masters eventually passing away. Because of these health problems, the most reasonable alternative as stated above was to permit Mr. Stiverson to testify by exercising the power of attorney granted by Mr. Masters.

Protestants further allege error in the examiner's finding that protestants Tonkovich and Dressler had no discernible interest over which the Commission had jurisdiction and that said appearances were untimely and prejudicial. Essentially protestants are arguing they should have been allowed to participate in the hearing or, in the alternative, that the proceedings should have been postponed pending resolution of alleged conflicting contractual claims in a proper forum.

Protestants cite Section 1.04 of the Commission's Rules and Regulations in support of their contentions. That rule states: "Any person, firm, company, corporation, mercantile, agricultural or manufacturing society, body politic or municipal corporation, railroad or public utility, may become a party: (d) by entering an appearance at the hearing." However, this has not been construed to mean that *a mere appearance* at a hearing entitles a party to take part in the proceeding.

In *Schwerman Trucking Co.*, Case No. 3514, in an order dated May 21, 1962 the Commission, called upon to interpret the same language, stated this rule "must be construed to mean that any person, corporation or natural 'having an interest' in the case, controversy, or proceeding may become a party." This requirement of an "interest" is based on the practical consideration that there be some limitations upon the hearing and issues to be decided. The Commission must ultimately make this "interest" determination, however it is the attorney examiner who will be called upon to make the initial decision as to standing based upon "interest".

This brings us to the question of whether or not protestants Tonkovich and Dressler possessed sufficient "interest" at the time of their appearance to warrant a finding of standing to oppose the transfer under consideration at that time.

In this proceeding it is apparent that neither Tonkovich nor Dressler have such an interest in these proceedings. Tonkovich alleges an oral contract with the transferor, and Dressler alleges a written contract with the transferor. That is all they have, mere allegations, and allegations do not make a contract. These parties have not taken any steps to perfect their rights under these allegations. It is not within the jurisdiction of this Commission to decide contract rights, but is the province of an appropriate court of law, and in this situation the protestants have had ample time to seek their appropriate remedy in the proper court. It is not the fault of this Commission that protestants sat on their rights. The Commission is also aware that the attempt of A. L. Dressler to secure a permanent restraining order prohibiting the subject transfer based upon his alleged contractual rights was denied by the



Common Pleas Court in Muskingum County on March 22, 1974. This would seem to raise some substantial question concerning the contract rights of the protestant Dressler. Since there was no offer of proof that any claims had been pursued in a proper forum, then it logically follows that protestants Dressler and Tonkovich exhibited no standing whereby any established right or claim would be affected by the outcome of the subject transfer.

As for the proper time of intervention, the time for these protestants to intervene would be when Clyde G. Clift withdrew from the hearing, and not four months later. They had no interest in the proceedings because they failed to perfect, or even institute action to perfect their alleged contract rights. Protestants should only be permitted to intervene in a proceeding when they have an interest in the proceeding and have made a timely motion to intervene. Protestants should not be permitted to intervene when all they will succeed in doing is disrupt the proceeding the cause unnecessary delays predicated upon allegations of injury to rights which have not been pursued.

Protestants cite *New York Central Railroad Co. v. Pub. Util. Comm.*, 157 Ohio St. 257 (1952) in an attempt to show they were denied due process by not being allowed to participate in the hearing. In the syllabus of that case, the court stated any party affected by temporary actions of the Commission has a right to be heard. However, since these particular protestants have no interest in the proceedings they were not denied due process. Finally, even though they have no interest, the parties were given an opportunity to make a statement for the record and were therefore, not denied due process or prejudiced by not being al-

lowed to participate in a hearing in which they could exhibit no interest supportive of such continuing participation.

The final argument made by the protestants is that there should have been a court determination of the capacity of the transferor to contract and that such determination was a condition precedent to the Commission continuing jurisdiction herein. They also argue that an approval of the transfer to Neff would promote a potential breach of contract by the transferor. In reply to the latter question, in order to have a breach of contract there must be a contract. There has been no proof of any other contract than that before the Commission so the argument is moot and meaningless.

Actually the questions of the legal capacity of the transferor contract has been rendered moot by the demise of Mr. Masters. Because of the obvious evidentiary problems, it would be extremely difficult to attempt to prove his capacity at the time of the initial transfer hearing. The question of his capacity quite possibly was answered when the restraining order sought by Dressler was denied. This Commission as stated does not decide contract rights. The protestants should have sought to perfect their rights under contract and file a timely protest. The fact the protestants failed to do so is not the fault of this Commission. If the Commission were, to grant these requests for continuation until all differing claims were resolved, if indeed there are any left to resolve, it would unnecessarily and severely prejudice the parties hereto.

The Commission, upon review of the arguments put forth by Tonkovich and Dressler as discussed above, finds that such allegations of paramount contractual rights barring a proposed transfer appear seldom before the Commission. In the *Application of Milliron*



*Company, transferor and J. Miller Express, Inc., transferee to transfer Certificate No. 2190-I*, Case No. 73-191-C, an appearance was tendered as an intervenor in opposition to the transfer on the basis of a prospective breach of contract between the transferor and the intervenor. While the reporting examiner permitted the intervenor to participate, the Commission made the following observations at pages 2 and 4 of its order:

> "The reporting examiner correctly found it necessary to disregard all testimony on the contract breach issue for the reason that such an issue is justiciable in a court of law and not before this Commission since this Commission does not have jurisdiction to adjudicate it."
> "As to the intervention of Tajon, Inc., the Commission finds that it should have been denied in the first instance. It has already been noted that the Commission is not the proper forum for the adjudication of a contract dispute. . ."

Further, in the above-quoted transfer, the Commission reviewed the evidence adduced and granted the transfer, overruling the exceptions of Tajon, Inc.

The Commission finds that the conclusions of the reporting examiner in recommending that the instant transfer from Masters to Neff be granted are well made and are hereby upheld. The Commission further finds the exceptions of Tonkovich and Dressler to the examiner's recommendation are not well taken for the reasons set forth herein and should be overruled.

FINDINGS OF FACT:

(1) On September 10, 1973, Sam Masters, dba Masters Transfer Service, transferor, and Clyde G. Clift, transferee, filed a joint application with this Commission to transfer Certificate of Public Convenience and Necessity Nos. 3186-I and 5376-I.

(2) Certificate No. 3186-I, presently in good standing with the Commission, authorizes:

property from all points in Monroe County to all points in the State of Ohio and reverse

(Duplicate authority restriction)

(3) Certificate No. 5376-I, presently in good standing with the Commission, authorizes:

property from and to Barnesville, Ohio, and the territory within a five (5) mile radius therefrom.

(Duplicate authority restriction)

(4) Notice of the filing and pendency of the application was published once a week for three consecutive weeks in *The Monroe County Beacon*, being a newspaper of general circulation in Monroe County, the principal place of business of both applicants.

(5) Public hearing on the above-described application was held on October 16, 1973 at which time the applicant transferee appeared, however, information was received to the effect that the applicant transferor's testimony would be submitted by his attorney in fact under power of attorney due to transferor's illness.

(6) The proposed transfer from Masters to Clift was opposed by Beryl O. Carpenter, Neal Graham and Larry Emery, claiming to be residents of Monroe County attacking the fitness of Clyde G. Clift to hold authority from the Commission.

(7) Public hearing was held on November 1, 1973, at which time James R. Stiverson appeared



as attorney in fact under a power of attorney executed by the ailing and hospitalized Masters, and submitted testimony concerning the transferor's operations, continuing need for service and the motivation for transfer.

(8) Public hearing was held on December 27, 1973 with the following pertinent occurrences:

(a) Commission informed of November 19, 1973, assignment by Clift of all interest in and obligations imposed by the contract for purchase and sale with Masters to Robert Neff and Sons, Inc. (assignment tendered as exhibit).

(b) Commission informed that one A. L. Dressler had filed for temporary and permanent restraining order to prevent Masters, Clift and/or Neff from transfer of certificates and, that temporary restraining order issued by Muskingum County Court of Common Pleas (effective until January 3 ,1974).

(c) Case continued due to parties being bound by terms of restraining order.

(9) Public hearing held on April 11, 1974 with following pertinent occurrences:

(a) Appearance on behalf of one John D. Tonkovich, claiming an oral contract with Masters for purchase of certificates.

(b) Appearances tendered on behalf of one A. L. Dressler, claiming a written contract with Masters for purchase of cer-

tificates which cut of any right of assignment.

(c) Commission informed Muskingum County Common Pleas Court dissolved the temporary restraining order and found no relief warranted on Dressler's claim.

(d) New application reflecting intent to transfer to assignee-transferee Robert Neff and Sons, Inc., placed in Commission file along with new publication in Monroe and Muskingum Counties.

(10) Neither Tonkovich (oral contract alleged) or Dressler (written contract alleged) had pursued lawful resolution and/or establishment of their claims of paramount contractual rights under which they claimed standing to oppose and/or block the pending transfer from Masters to Neff.

(11) The Court of Common Pleas, Muskingum County, dissolved the temporary restraining order issued in December of 1973, and denied A. L. Dressler any other relief prayed in that action.

(12) The hearing examiner ruled that neither Tonkovich (oral contract alleged) nor Dressler (written contract alleged) had exhibited sufficient lawful interest in the outcome of the pending transfer from Masters to Neff to support their continuing participation therein and further ruled that the three residents of Monroe County had no further standing in



light of the November 19, 1973 assignment of interest from Clift to Neff as transferee.

(13) The Commission's file reveals that the application and supporting material submitted to the Commission on April 10, 1974, reflecting the assignment of interest from Clift to Neff as transferee, is in proper form.

(14) The reason for the transfer as stated upon the record is the poor health of Sam Masters rendering him unable to continue service under the authorities.

(15) The record made upon public hearing and the Commission's file reveal that the transferor is in a good financial condition and that the sale of the authorities will not affect the obligations to any creditor.

(16) The record made reveals no outstanding taxes due the State of Ohio from the transferor.

(17) The agreement reveals an $8,050.00 purchase price which has been placed in escrow by the transferee Neff, to be tendered to the transferor upon consummation of the transaction.

(18) The transferee, Robert Neff and Sons, Inc., is an established motor transportation company, holding both inter and intrastate authorities and engaging in various types of transportation business.

(19) The transferee's operations are in good standing with the Commission and Robert Neff and Sons, Inc., possesses sufficient equipment, finance, facilities, experience, ability and knowledge of applicable rules and stat-

utes to receive the subject authorities and render a service pursuant thereto.

(20) The transferee, if the instant application is granted, has no objection to a duplicate service restriction being placed upon its existing authority.

(21) Both the transferor's testimony (by power of attorney) and that submitted on behalf of Robert Neff and Sons, Inc., reveals a continuing use and need for the subject authorities and service thereunder.

(22) The transferee maintains the opinion that the purchase price specified in the contract, to which he has become a party by assignment, is reasonable and said price has been placed in escrow for purposes of consummation of the transaction.

(23) Pursuant to application therefor, Robert Neff and Sons, Inc., was granted temporary authority to conduct operations under the subject authorities on May 14, 1974, with said temporary authority and authorized service thereunder being extended by Commission Entry on several occasions.

(24) On August 7, 1974, the reporting examiner issued a report recommending that the Commission should approve the transfer of Certificate Nos. 3186-I and 5376-I from Sam Masters, dba Masters Transfer Service to Robert Neff and Sons, Inc.

(25) On August 19, 1974, exceptions to the report and recommendation of the attorney examiner



were filed on behalf of John D. Tonkovich and A. L. Dressler, which raised four basic issues with respect to the hearing examiner's treatment of the circumstances presented and rulings adverse to the alleged "interests" of Tonkovich and Dressler.

(26) On September 10, 1974, a reply to exceptions was filed on behalf of the joint applicants, Masters and Neff.

(27) The Commission finds as a matter of fact from public record, that on August 22, 1974, Sam Masters, the transferor herein died.

(28) The Commission's file contained a certified copy of a Journal Entry of the Monroe County Court of Common Pleas, Probate Division, dated February 21, 1975, authorizing Virginia Masters, executrix of the estate of Sam Masters, deceased, to complete the terms of the subject contract for sale of the involved authorities.

CONCLUSIONS OF LAW:

(1) The application to transfer Certificate Nos. 3186-I and 5376-I from Sam Masters, dba Masters Transfer Service to Robert Neff and Sons, Inc., is in proper form and publication has been made as required by law.

(2) The Commission has jurisdiction to hear and decide all issues raised herein pertinent to a proper and lawful transfer of motor carrier authority.

(3) The motivation for the parties seeking transfer is within the best interest of the public

in securing and maintaining the best possible transportation service.

(4) There exists a demonstrated continuing use and need for the authorities involved and service thereunder.

(5) The transferee, Robert Neff and Sons, Inc., is a proper party to which the common motor carrier authority under consideration may be granted.

(6) The acceptance and consideration of testimony submitted under power of attorney on behalf of the ailing party transferor was a proper exercise of discretion on the part of the hearing examiner under the circumstances of this case.

(7) The Commission is not the proper forum for seeking resolution of conflicting claims of contractual rights to a piece of motor carrier authority.

(8) The hearing examiner's ruling that John D. Tonkovich and A. L. Dressler had no standing which would support their continued participation in the instant proceedings was legally proper.

(9) There is a demonstrated continuing use and need for the certificates involved.

(10) The transferee is a property to which the subject certificates may be granted.

(11) The case submitted on behalf of Sam Masters dba Masters Transfer Service and Robert Neff and Sons, Inc., to transfer Certificate Nos. 3186-I and 5376-I, establishes compliance



with the requirements for transfer of motor carrier authority set forth in *Frank Cartage*, (supra).

(12) The appearances of John D. Tonkovich and A. L. Dressler as protestants and/or intervenors in opposition were not well made and should be denied.

(13) The exceptions of A. L. Dressler and John D. Tonkovich to the recommendation of the attorney examiner are not well taken and should be overruled.

(14) The application of Sam Masters, dba Masters Transfer Service and Robert Neff and Sons, Inc., to transfer Certificate Nos. 3186-I and 5376-I is well made and should be granted.

ORDER:

It is, therefore,

ORDERED, That, for the reasons enumerated above, the protests and/or intervention of A. L. Dressler and John D. Tonkovich be, and hereby are, denied. It is, further,

ORDERED, That the exceptions of the protestants and/or intervenors, to the report and recommendation of the attorney examiner, be, and they are hereby, overruled. It is, further,

ORDERED, That this application be, and it is, hereby, granted. It is, further,

ORDERED, That a period of sixty (60) days be, and hereby is, accorded wherein there shall be completed the transfer of Certificate Nos. 3186-I and 5376-I from Sam Masters, dba Masters Transfer Ser-

vice to Robert Neff and Sons, Inc., said transfer to be complete upon full compliance with the following provisions and the issuance of a transferred certificate:

(1) Transferee shall file, with the Commission, the required insurance or bond as provided in Chapter 15 of the Commission's Code of Rules and Regulations.

(2) Transferee shall pay all prescribed taxes on equipment to be operated.

(3) Transferee shall file with the Commission a formal notice of adoption of tariffs and adoption supplements as provided in Chapter 13 of the Commission's Code of Rules and Regulations.

(4) Transferee shall file, with the Commission, new concurrences, if any, and new powers of attorney to replace and supersede those now filed by transferor, as provided in Chapter 13 of the Commission's Code of Rules and Regulations.

(5) Transferor shall file, with the Commission, an interim report (annual report from January 1 preceding transfer to date transfer is complete).

(6) There shall be no diminution of service on the part of the transferee.

It is, further,

ORDERED, That, as hereinbefore set forth, transfer shall be completed within the time limit provided, else this Order shall be null and void. It is, further,

ORDERED, That copies of this Opinion and Order be served, forthwith, certified mail, return receipt requested, upon the parties hereto and upon their counsel. It is, further,



ORDERED, That copies of this Opinion and Order be mailed to all other interested parties.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ C. LUTHER HECKMAN
Chairman

/s/ SALLY W. BLOOMFIELD
Commissioner

Entered in the Journal
May 13, 1976
A true copy:

/s/ RANDALL G. APPLEGATE
Randall G. Applegate, Secretary